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Petitioner,

v.

[redacted]

Respondent.

On Writ of Certiorari to the
[redacted]

BRIEF FOR RESPONDENT

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[

QUESTION PRESENTED

Does 15 U.S.C. § 381, which prohibits a State from taxing foreign corporations whose only activities within the State are the solicitation of orders, bar the assessment and collection of Wisconsin franchise tax from respondent for the years 1973-1978?

The Wisconsin Supreme Court answered this question in the affirmative.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The Respondent, Wm. Wrigley Jr. Company, is a corporation. Respondent has no parent companies or subsidiaries (except wholly owned subsidiaries) to list pursuant to Rule 29.1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARENT COMPANIES & SUBSIDIARIES	ii
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF THE CASE	1
Factual Background	2
Procedural History	6
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE STATUTORY LANGUAGE AND ITS HISTORY SUPPORT THE RESULT BELOW	11
II. THE WISCONSIN SUPREME COURT CORRECTLY CONSTRUED SECTION 381 AND ADOPTED A STANDARD THAT CARRIES OUT CONGRESS' INTENT	17
A. Petitioner Mischaracterizes the Holding Below	17
B. The Standard Applied Below Is Superior to Those Urged by Petitioner and the Amici Supporting It	20
III. THE COURT SHOULD IGNORE LABELS AND CONCENTRATE INSTEAD ON WHAT CONGRESS ATTEMPTED TO ACCOMPLISH	26
IV. THE STATUTE NECESSARILY RECOGNIZES AN EXCEPTION FOR DE MINIMIS ACTIVITIES	28
V. WRIGLEY'S BUSINESS ACTIVITIES IN WISCONSIN WERE PROTECTED FROM TAXATION BY SECTION 381	30
VI. PETITIONER'S ARGUMENT RELATING TO NEXUS SHOULD BE ADDRESSED TO CONGRESS	33
CONCLUSION	38

TABLE OF AUTHORITIES

CASES:

	Page
Abbott Laboratories v. *Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976)	29
Bell v. *Wolfish*, 441 U.S. 520 (1979)	29
Brown v. *Thomson*, 462 U.S. 835 (1983)	29
Brown-Forman Distillers Corp. v. *Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *appeal dismissed, cert. denied*, 359 U.S. 28 (1959)	*passim*
CFTC v. *Schor*, 478 U.S. 833 (1986)	28
Chattanooga Glass Co. v. *Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979)	27
Chisom v. *Roemer*, 111 S. Ct. 2354 (1991)	13
Clairol, Inc. v. *Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971)	12, 26, 27
Clements v. *Fashing*, 457 U.S. 957 (1982)	29
Commissioner v. *Clark*, 489 U.S. 726 (1989)	13
Connecticut v. *Doehr*, 111 S. Ct. 2105 (1991)	27
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984)	28, 30
D.H. Holmes Co. v. *McNamara*, 486 U.S. 24 (1988)	36
Davis v. *Bandemer*, 478 U.S. 109 (1986)	28
Edelman v. *Jordan*, 415 U.S. 651 (1974)	27
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)	34
Gillette Co. v. *Tax Commission*, 56 App. Div.2d 475, 393 N.Y.S.2d 186 (3d Dept. 1977), *aff'd*, 410 N.Y.S.2d 65 (1978)	18, 31
Heublein, Inc. v. *South Carolina Tax Comm'n*, 409 U.S. 275 (1972)	36
Ingraham v. *Wright*, 430 U.S. 651 (1977)	29
International Shoe Co. v. *Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959)	*passim*
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	28
Mobil Oil Corp. v. *Commissioner of Taxes*, 445 U.S. 425 (1980)	34
Moorman Mfg. Co. v. *Bair*, 437 U.S. 267 (1978)	37
Norfolk & W. Ry. v. *Liepelt*, 444 U.S. 490 (1980)	29

TABLE OF AUTHORITIES—Continued

	Page
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959)	13, 14, 20, 34
Pennsylvania v. *Mimms*, 434 U.S. 106 (1977)	29
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946)	35, 36
Quill Corp. v. *North Dakota*, No. 91-194	11
Sony Corp. of America v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984)	29
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962)	30
Texas State Teachers Ass'n v. *Garland Ind. School District*, 489 U.S. 782 (1989)	28
Trinova Corp. v. *Michigan Dept. of Treasury*, 111 S. Ct. 818 (1991)	34
Tully v. *Griffin, Inc.*, 429 U.S. 68 (1976)	27
Union Bank v. *Wolas*, 60 U.S.L.W. 4043 (U.S. Dec. 11, 1991)	13
United States Tobacco Co. v. *Commonwealth*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978)	18, 19, 31, 32
United States v. *Bass*, 404 U.S. 336 (1971)	15
United States v. *Jacobsen*, 466 U.S. 109 (1984)	28
United States v. *Owens*, 484 U.S. 554 (1988)	13
United Steelworkers of America v. *R.H. Bouligny, Inc.*, 382 U.S. 145 (1965)	37
Washington v. *Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979)	29

STATUTES:

15 U.S.C. § 381	*passim*
15 U.S.C. § 1011	35

CODES:

Wisconsin Administrative Code, Section Tax 2.82 (3)	29

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, § 8, cl. 3	34

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS: Page

105 Cong. Rec. 11395 (1959) 13
105 Cong. Rec. 11958 (1959) 28
105 Cong. Rec. 16353 (1959) 14, 16
105 Cong. Rec. 16355 (1959) 14
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105 Cong. Rec. 16930 (1959) 14, 28
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H.R. Rep. 936, 86th Cong., 1st Sess. (1959) 13, 15
H. Rep. No. 1480, 88th Cong., 2d Sess. 145 (1964) .. 15
S. Rep. 936, 86th Cong., 1st Sess. (1959) 14
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Webster's Third International Dictionary (1976) .. 11
Webster's Third New International Dictionary of the English Language (unabridged 1961) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-119

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,
v.
WILLIAM WRIGLEY, JR. COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

The issue in this case is whether the Wisconsin Supreme Court properly applied a statute, 15 U.S.C. § 381, to the activities of the Respondent William Wrigley, Jr. Company [1] ("Wrigley") in Wisconsin during the years 1973 through 1978. The outcome in this case, as in each case arising under this statute, is dependent upon its unique facts and circumstances.[2] Thus, applying the stat-

[1] We have used here the title of the company as it appears in the caption of the case. The company's correct name, however, is "Wm. Wrigley Jr. Company."

[2] Despite the conflict alleged to exist among various tribunals regarding the proper interpretation of Section 381, no court faced with the precise mix of activities in which Wrigley engaged in Wisconsin has held them to exceed the scope of the statute. To the contrary, as the Wisconsin Supreme Court pointed out below, in

ute in this case necessarily requires a careful review of the facts.

In its Statement of the Case, petitioner, the Wisconsin Department of Revenue, gives a highly selective summary of the factual and procedural background of this case. For example, it essentially adopts the description of Wrigley's activities as set forth by the Wisconsin Tax Appeals Commission ("TAC"), while wholly ignoring the fact that the Wisconsin Supreme Court disavowed many of TAC's findings.[3] As a result, petitioner has mischaracterized part of the factual and procedural background of this case and has exaggerated the significance of a few elements in disregard for the totality of circumstances.

Factual Background

Wrigley is a Delaware corporation with its commercial domicile and principal place of business in Illinois. The company manufactures various chewing gum products and sells them to wholesalers and retailers across the nation. JA 3, 47-49.[4]

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the one case where precisely the same kind of activities were at issue, the outcome was the same as here. *In the Matter of the Petition of William Wrigley, Jr. Company*, slip op. (N.Y. Tax Comm'n, Mar. 11, 1987), a copy of which is appended to Wrigley's Brief in Opposition to Petition for Writ of Certiorari at a.3.

[3] The *amici curiae* supporting petitioner also disregard the Wisconsin Supreme Court's interpretation of the factual record, preferring instead to rely on TAC's findings. *See, e.g.*, Brief Amicus Curiae of the Multistate Tax Commission in Support of Petitioner ("MTC Br.") at 22-23; Amicus Curiae Brief of the City of New York in Support of Wisconsin Department of Revenue ("NYC Br.") at 15.

[4] For ease of reference, we use the same designations to the record that petitioner uses. T1 refers to the first day of trial testimony; "A" to the appendix to the petition for certiorari; "a." to the appendix to the opposition to the petition for certiorari; "JA" to the Joint Appendix filed with this Court; and "R." to the Record as lodged in the Wisconsin Supreme Court and in this Court.

Wrigley's sales efforts in Wisconsin conform to the dictates of Section 381 ("orders [must be] * * * sent outside the state for approval or rejection, and * * * filled by shipment or delivery from a point outside the State"). Wrigley's Wisconsin sales operation is and always has been conducted out of its suburban Chicago office. All Wisconsin orders were approved in Chicago and shipped back by common carrier. JA 10-11, 95-96. All credit and collection activities were handled by Wrigley's credit department in Chicago. JA 25, 71-72, 96-97. (The evidence showed that Wrigley's Wisconsin regional sales manager from 1973 to 1975 voluntarily intervened two or three times per year in credit disputes, but only in order to cultivate the account and protect future sales; at no time did he seek payment from the customer. JA 71-73.)

Wrigley kept its presence in Wisconsin to a minimum. It was not licensed to do business there. It did not own or lease any real estate there; it did not open a bank account there; nor did it own or operate a manufacturing or warehousing facility in the State. Neither Wrigley nor its sales representatives maintained any office in Wisconsin. JA 10-13, 94. When the Wrigley sales manager from 1973 to 1976 kept a file cabinet and a desk in a corner of his basement, where he prepared and kept reports to the company, Wrigley did not even reimburse him for the use of his home. JA 12, 67-69.

Wrigley's only presence in Wisconsin during the years in question was through its resident sales force, which was made up of a regional sales manager, who resided in Wisconsin, and four sales representatives, each of whom was responsible for a geographic territory within the State. (In one year, 1976, Wrigley employed five sales representatives.) JA 47-48, 86-87. Wrigley's Wisconsin sales representatives devoted virtually all of their time to the solicitation of orders from wholesale and retail sellers of chewing gum. JA 35, 42-43, 89-90.

Neither Wrigley nor any member of its sales force was listed in a Wisconsin telephone directory. In fact, the business card carried by Wrigley's Wisconsin sales force contained the representative's name but listed the address and phone number of Wrigley's district sales office in Illinois. JA 12, 24. Even Wrigley's Wisconsin advertising was contracted for by an independent agency located in Chicago. JA 14.

Wrigley's strategy for soliciting orders for its products takes into account the realities of the chewing gum business. Consumers buy chewing gum almost exclusively on impulse; seldom is the purchase planned in advance. Thus, for Wrigley to generate orders from wholesalers and retailers, its products must be displayed in such a way that they are highly visible and readily available to the ultimate consumer at locations such as check-out counters. JA 30-31, 57. Further, chewing gum has a limited shelf life; it loses its flavors and texture unless sold and used within approximately six months of manufacture. JA 57-58, 117. Keeping a supply of fresh gum on hand is therefore as important to maintaining consumer demand and generating new orders as are any other marketing tools available to the company. These two factors—the impulse nature of most purchases and the short shelf life of the product—are of unique concern in the marketing of confectionary items such as chewing gum and are crucial to the way in which Wrigley organizes its solicitation activities.

Typically, Wrigley's sales representatives spent their days making presentations designed to convince an account to accept a promotional offering or to take on a new brand or packaging, JA 26-27, 88, or surveying how the various Wrigley flavors and packages were displayed and checking them for freshness. JA 27-28, 116-117. If an account's supply of gum was stale, the representative would replace the stale packages with fresh ones at no charge. On rare occasions, a sales representative might

fill a retailer's counter-top display case from the supply of gum he kept on hand primarily for samples and for exchange of stale gum. He would report the transaction to Wrigley on an "agency stock check," the form used to account internally for the representative's supply of sample/replacement product. JA 28, 43-44, 61, 119-120; T1 97.[3] The amount of product involved in these "agency stock checks" was miniscule—estimated at 0.00007 of one percent of Wrigley's total Wisconsin sales in 1978. A 43. The Wisconsin Supreme Court found that these agency stock checks were not sales, inasmuch as the representatives never negotiated a price, never billed an account, and never accepted money for gum. A 43; JA 37-38, 119-120.

Although an effort has been made to mischaracterize him as a business manager with duties unrelated to sales, the regional sales manager was the most important member of Wrigley's sales team, with direct sales responsibilities. He was responsible for soliciting orders from "key" accounts (major accounts responsible for 80% of Wrigley's total sales volume), and spent 80-95% of his time in the field. JA 49-50, 87-90. A portion of his remaining time was devoted to such sales-oriented activities as group meetings to strategize sales of new products or packaging, or the communication of company sales policy to representatives. JA 90-91.

As a necessary incident to the deployment of an interstate sales force, Wrigley engages in personnel-related activities. These personnel activities were centered in Chicago. The Chicago district manager bore responsibility for all district personnel decisions, including the hiring, termination, promotion and salary of Wisconsin sales representatives. The regional sales manager in Wisconsin simply carried out the operational tasks of interviewing

[3] The record shows that the value of a sales representative's on-hand supply was minimal—approximately $700 to $1,000. JA 29, 61, 110, 121. Moreover, at any one time, 40% of that supply was stale. JA 61.

prospective sales representatives, evaluating the Wisconsin sales force, and communicating personnel decisions; although he made recommendations concerning salary raises, they often were disregarded by the Chicago district manager. JA 52-53, 98, 103, 112-115. During the entire six-year period in issue, only a few hiring decisions were made and only two representatives were terminated. JA 52, 102-106.

Procedural History

In 1980, petitioner issued a "Notice of Franchise Tax Assessment" claiming that Wrigley owed franchise tax, interest and penalties for the years 1973 through 1978 in the total amount of $246,641.04. R. 15. Ex. 1. Wrigley petitioned for a redetermination on the ground that Section 381 precluded the assessment because the company did not engage in business within Wisconsin in a manner sufficient to subject it to the State's taxing jurisdiction. R. 15, Ex. 2. On September 3, 1981, petitioner denied Wrigley's petition, resulting in a total assessment of $271,707.63. R. 15, Ex. 3.

Wrigley then took its case to TAC. An evidentiary hearing was held before Commissioner William Bradford Smith on August 26 and 27, 1985. R. 15; JA 2-123. Before TAC could issue its decision, however, Commissioner Smith left the Commission as a result of a legislative reorganization. His replacement was Commissioner Robert Junceau, an attorney with petitioner at the time the Wrigley case was heard by TAC. R. 15; a.1.

Without consulting Commissioner Smith, the only commissioner to take any evidence, TAC nevertheless proceeded to decide the case. It held that Wrigley's activities in Wisconsin exceeded the scope of protection afforded by 15 U.S.C. § 381 and that Wrigley was therefore subject to taxation in Wisconsin. A 243.

Both Wrigley and petitioner appealed TAC's decision to the Circuit Court of Dane County, Wisconsin. R. 15. In

its Memorandum Decision and Order dated August 20, 1987, the circuit court reversed because TAC had made its decision without Commissioner Smith's participation. The circuit court found that where TAC's findings turned upon the credibility of Wrigley's witnesses or upon the weight or inferences accorded their testimony, Commissioner Smith's impressions were vital. The court questioned TAC's findings that Wrigley's regional sales manager was involved in credit matters, that its representatives maintained offices in their homes, and that Wrigley conducted regular and periodic training seminars in Wisconsin, "amongst others." The court also cautioned that any assessment of Wrigley's immunity from taxation must be conducted on an annual basis, without lumping together activities that might have covered several years. R. 15; A 204-217.

Upon remand, TAC met with Commissioner Smith. He filed a written statement to the effect that he found the Wrigley witnesses to be "extremely credible." He stated further that, because petitioner "offered nothing to controvert them," he would have proposed findings of fact and conclusions of law in Wrigley's favor. R. 15; a.2. Despite the impressions of the evidence given by the one commissioner who actually heard it, a three-member TAC majority nevertheless reaffirmed its prior decision in a brief order issued in November 25, 1987. R. 15; A 163-167. The order was accompanied by a lengthy dissent by one commissioner in favor of Wrigley. R. 15; A 168-203. (The chairperson, Kevin C. Potter, did not participate.)

Both Wrigley and petitioner appealed to the circuit court, and their appeals were consolidated. The circuit court (a different judge presiding) again reversed TAC and held that Wrigley was not liable for the franchise tax at issue. In a lengthy study of the record, the court determined that TAC's factual findings were either unsupported by any evidence or rested on questionable interpretations of the facts. A 110-112. After carefully analyz-

ing the legislative history of 15 U.S.C. § 381 and numerous cases from other States, the court concluded:

> Wrigley's enterprise in this state was solicitation of orders for its products and no other. Each of [Wrigley's] activities was either inextricably related to that enterprise, or was so isolated an exception to common practice that it should not be viewed as forfeiting the protection of the statute. [A 131.]

Petitioner appealed to the Wisconsin Court of Appeals. On December 7, 1989, the court of appeals, splitting 2 to 1, reversed the circuit court's decision. The majority found that Wrigley's activities within Wisconsin were beyond the protection of the statute. A 71. In his dissenting opinion, Judge Dykman criticized the majority for failing to analyze the case in the context of chewing gum industry custom and concluded that, when properly analyzed, Wrigley's Wisconsin activities were too isolated and infrequent to give rise to tax liability. A 75-77.

The Wisconsin Supreme Court granted Wrigley's petition to review. On February 19, 1991, Wisconsin's high court issued a unanimous decision reversing the court of appeals. After studying the factual record, reviewing the legislative history, and analyzing the cases upon which the parties relied, the court concluded that "Wrigley's activities in Wisconsin did not go beyond the 'solicitation of orders' as that term is used in 15 U.S.C. sec. 381." A 45.

SUMMARY OF ARGUMENT

This case is one of statutory construction alone; there are no constitutional issues. The key phrases in the governing statute, "business activities" and the "solicitation of orders," were intended by Congress to be read in their normal commercial sense, meaning the on-going process and related activities by which orders are sought and resought. That the activities included in these phrases could not possibly have been limited to a simple request for an order is evidenced by the fact that petitioner does not

argue for such a construction, virtually no court has adopted it, we are aware of no commentator who has proposed it, and the legislative history affirmatively shows that this was not the construction intended.

Congress sought through Section 381 to reverse two state court cases imposing tax liability in which this Court denied certiorari, and in each of those cases the solicitation activities went beyond mere requests for orders. The state courts that have given the greatest amount of attention to the meaning and purpose of the statute have concluded, as did the Wisconsin Supreme Court below, that ordinary and necessary "business activities" accompanying the solicitation process are immune from taxation. Courts must, therefore, look to how a product is sold. In the chewing gum industry, the sale of a single pack is largely inconsequential; repeat orders are essential.

The pre-sale/post-sale test proposed by petitioner ignores the reality of the marketplace. Because shelf life is short and purchases are largely made on impulse, the solicitation of chewing gum orders necessarily involves a never-ending series of sales-related activities, such as placing displays and the replacement of stale gum. The pre-sale/post-sale test also would be impossible to administer. It fails to account for the on-going nature of solicitation, which is designed to guarantee a continuing stream of orders, thereby making the "end" of any single sale meaningless. It also would enmesh the courts in a quagmire of litigation over issues such as when a sale was completed and whether the normal wrap-up activities following that sale vitiated the income tax immunity.

The guidelines proposed by the *amicus* Multistate Tax Commission are closer to the mark, but they would not change the results in the two cases Congress intended to reverse, and they treat as immune certain activities that the Commission itself claims are nonimmune. In any event, the record in this case, as properly construed by the court below, would place Wrigley within the immune guidelines.

Section 381, properly interpreted, clearly precludes Wisconsin from imposing an income tax upon Wrigley. Wrigley did virtually nothing within the State during the years in question other than deploy its five or six-person sales force to carry out normal sales functions. Orders were sent outside the State for approval or rejection and were filled by shipment or delivery from outside the State. Credit and collection activities were handled out-of-state. The company was not licensed to do business in Wisconsin, it did not own or lease real estate there, and it had no bank account, office, manufacturing plant, or warehouse in the State. It was not listed in a Wisconsin telephone directory, and its salesmen's business cards did not carry Wisconsin addresses or telephone numbers. Wisconsin advertising was contracted for by an independent agency outside the State. Personnel decisions were all made out-of-state. In short, Wrigley's in-state activities were either direct solicitation or inextricably bound up in such solicitation, and any deviation was *de minimis*.

Petitioner's "nexus" argument should be directed to Congress, not this Court. Congress has plenary power over interstate commerce and has, through this statute, directed that the States forego taxation of sales solicitation alone. Whether or not there is nexus in a given case is thus irrelevant.

Finally, the Court should approach this statute not in the narrowest possible sense but with an understanding that Congress was concerned about companies having to pay lawyers and accountants, and fill out forms, just to keep up with the demands of the States in which they make sales. A narrow construction of the statute would defeat this Congressional intent by forcing companies to sustain compliance burdens that would make multi-state operations infeasible. The Court should not so hold, and thereby frustrate Congress' regulation of interstate commerce.

ARGUMENT

I. THE STATUTORY LANGUAGE AND ITS HISTORY SUPPORT THE RESULT BELOW

Contrary to petitioner's view, this case, unlike the one that is to be argued in tandem with it,[6] presents no constitutional questions. Instead, the only issue before the Court is one of statutory construction. All statutory construction, of course, must begin with the words of the statute itself.

Section 381, insofar as relevant here, prohibits a State from imposing a net income tax upon an entity engaged in interstate commerce if that entity's only in-state "business activities * * * are * * * the solicitation of orders * * * for sales of tangible personal property," so long as orders are sent outside the State for approval and are filled from a point outside the State. Since it is conceded that the orders in this case were sent outside Wisconsin to Wrigley's headquarters in Illinois for approval and were filled by common carrier shipment into Wisconsin from Illinois, Ptr. Br. 7, the sole issue before the Court is whether the limited "business activities" in which Wrigley engaged constituted "the solicitation of orders" within the meaning of Section 381.

The use of the term "business activities", of course, is significant, for it not only establishes the context of the endeavor as commercial, but also speaks of a plurality of events. Moreover, "solicitation" covers more than a single, specific request or entreaty; it is a process, rather than an event that occurs at one fixed moment in time. Thus, the term "solicitation" has been defined in terms of "the pursuit" and "practice" of soliciting.[7] "Solicita-

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[6] *Quill Corp.* v. *North Dakota*, No. 91-194.

[7] *Webster's Third International Dictionary*, p. 2169 (1976). Similarly, a "solicitation" to a crime can include a number of acts by which the actor "enticed" or "otherwise encouraged" a person to commit the crime. *Blacks Law Dictionary*, p. 1249 (5th Ed. 1979).

tion," in short, thus covers a range of activities designed to bring about a particular result—in this case, the placing of orders for chewing gum. And the most common example of "solicitation" is "selling" [8], which undeniably can be an on-going process.

Literal definitions to one side, there can be no question in this case but that Congress intended more than a simple request for an order to be immunized from taxation. We are aware of no commentator who has taken the position that only the request is immune, nor has virtually any court so held. Petitioner itself does not contend that the statute is so limited.[9] Finally, as shown below, the legislative history conclusively demonstrates that more than a request for a sale was intended. We thus use legislative history not to urge a construction of

[8] *Webster's Third New International Dictionary of the English Language*, p. 1629 (unabridged 1961).

[9] For example, the pre-sale/post-sale standard urged on the Court by petitioner would admittedly permit "such activities as the use of samples and product demonstrations." Ptr. Br. 25; *see also id.* at 32.

With one exception, the *amici* supporting petitioner similarly do not take an absolutist view. The City of New York concedes that certain *de minimis* activities might be immunized, and that the ownership of samples and calls on customers of customers with "display techniques" would be immunized. NYC Br. 10-11, 14, 18-19. The brief of 29 States concedes that the Act immunizes "those customary or generally accepted acts which lead to the placing of orders" and then lists a number of immunized activities that go well beyond a simple request for a sale. Brief of Amici Curiae on the Merits In Support of Wisconsin Department of Revenue ("29 States Br.") at 4, 13. MTC agrees that "solicitation" includes not only activities that directly seek the placement of an order but "such collateral activities that are a necessary part of that effort." MTC Br. 24. Only the brief of New Jersey, Alaska and Arkansas ("N.J. Br.") at 1, 3-5, 9, supports the "strict" construction of *Clairol, Inc.* v. *Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971), and, as noted below, that opinion gives no reasons for its conclusion.

the statute that contradicts its plain meaning but to support an interpretation fully consistent with that meaning where Congress itself has failed to lay down the metes and bounds of the language used.[10]

The fact that Congress intended the statute to immunize a number of activities beyond a simple sales pitch is confirmed as well by the history of how Section 381 became law.

The first event that caught Congress' attention was this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), which included the decision in a consolidated case, *Williams* v. *Stockham Valves & Fittings, Inc.* As was made clear repeatedly during the Floor debates in both Houses and in the Senate and House Reports,[11] the *Northwestern States* decision triggered alarm bells in the commercial community because of the limited nature of activities carried on by the companies in those cases. The Court's decision, however, dealt entirely with a constitutional question—whether sufficient nexus existed between the taxing States and the companies' in-state activities. This Court held that the companies' activities established a sufficient nexus to satisfy the Commerce and Due Proc-

[10] *See United States* v. *Owens*, 484 U.S. 554, 562-563 (1988); *compare Chisom* v. *Roemer*, 111 S. Ct. 2354, 2362-67 (1991), *with id.* at 2369 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); *also compare Commissioner* v. *Clark*, 489 U.S. 726, 740-745 (1989), *with id.* at 728 n.* (Scalia, J., declining to join majority's discussion of legislative history); *cf. Union Bank* v. *Wolas*, 60 U.S.L.W. 4043, 4045 (U.S. Dec. 11, 1991) (Court refuses to use legislative history to refute plain meaning of statute).

[11] S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2549, 2557; S. Rep. 453, 86th Cong., 1st Sess. at 1-2, 5-6, 8, 11-12 (1959); H.R. Rep. 936, 86th Cong., 1st Sess. at 1-3 (1959); 105 Cong. Rec. 11395-17836.

ess Clauses, and, since the taxes were non-discriminatory and properly apportioned, they were constitutional.

Because both companies in the *Northwestern States* cases worked out of sales offices located in the taxing States,[12] Congress did not intend for Section 381 to reverse that decision, since the use of such offices went beyond what Congress intended to immunize.[13] However, Congress did intend to immunize the other aspects of the companies' activities,[14] and these included a number of services beyond simple requests for orders. For example, in one case salesmen drove company-owned cars, contacted customers of customers, and received claims for loss or damage in shipments, and in the other salesmen were engaged in "promotion and good will" for their companies and kept not only supplies on hand but "advertising literature" as well.[15]

While *Northwestern States* created the initial impetus, it was this Court's denial of certiorari in two other cases that galvanized Congress to action, as petitioner apparently concedes.[16] *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958),

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[12] *Northwestern States*, 358 U.S. at 454, 455.

[13] *See* S. Rep. 936, 86th Cong., 1st Sess. at 3 (1959); 105 Cong. Rec. 16930 (1959). In fact, a Bill that would have allowed such offices, S. 2524, was defeated. *See* 105 Cong. Rec. 16355, 16477 (1959).

[14] *See* n.11, *supra*.

[15] *Northwestern States*, 358 U.S. at 454-456. Some of these facts were explicitly pointed out to Congress. *E.g.*, 105 Cong. Rec. 16353 (1959).

[16] "Although [*Northwestern States*] may have created the initial impetus for legislative action, Congress was also reacting to two later cases in which the Court refused to grant certiorari. * * * [Section 381] may have intended to reverse the results reached in [those two cases] * * *." Ptr. Br. 23-24.

appeal dismissed, cert. denied, 359 U.S. 28 (1959); *International Shoe Co.* v. *Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). There were no local offices in these cases, and the legislative history is replete with evidence that Congress intended to immunize at the very least the types of activities involved in those cases. We do not base this statement of Congress' intent on a stray reference to, or a single legislator's comment upon, these cases. *Cf. United States* v. *Bass*, 404 U.S. 336, 346 (1971). Rather, *Brown-Forman* and *International Shoe* were *each* cited and discussed over a dozen times in Committee reports and during Floor debates.[17] Time and again, Congress was told that the dangers posed by these two cases had to be met and corrected, or companies would be mired in multiple-state tax compliance obligations, being forced to fill out so many forms that many could not afford to conduct business outside their own States.

In light of the pervasive presence of these cases in the legislative history, and the inescapable conclusion that Congress sought to overrule them,[18] we turn to their facts to find examples of the types of activities Congress intended to encompass within "solicitation of orders."

In *Brown-Forman*, the salesmen—or "missionary men" —not only sought orders but accompanied and assisted their wholesale customers' salesmen "in obtaining a suitable display of [Brown-Forman's] merchandise at the business establishments of said retailers."[19] *Brown-Forman*, 101 So.2d at 70. In other words, the salesmen

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[17] *E.g.*, S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2549; H.R. Rep. 936 at 2, 3; 105 Cong. Rec. 16360, 16367, 16376, 16470, 16471, 16475, 16493, 16496, 16500, 16929, 16930, 17771 (1959).

[18] *See* H. Rep. No. 1480, 88th Cong., 2d Sess. 145 (1964); Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 293, 302-303 (1985).

[19] *Brown-Forman*, 101 So.2d at 70; *see also Brown-Forman* Pet. for Cert., Oct. Term 1958, No. 142, at 4.

took to the road and helped create demand for the product by obtaining displays not only in their customers' locations but in the locations of retailers who ultimately placed orders through wholesalers.

In *International Shoe*, a Stipulation of Facts revealed that fifteen salesmen "regularly and systematically" solicited customers, producing over $15 million in sales during the three years in question. The salesmen carried samples of shoes from place to place in company-owned automobiles, and they made use of "hotel rooms or rooms of a public building which have sample rooms available for salesmen," paid for by International Shoe to display their samples.[20] In other words, they engaged in far more than simple requests for orders; they actively sought business on a broad front and in a variety of company-sponsored settings.

Again, it is clear that when Congress repudiated these two decisions, it was attempting to allow solicitation in the sense in which it is used in its normal commercial setting. Congress intended to immunize all efforts—"business activities"—legitimately made to obtain orders and to keep those orders coming so as to generate profits.

Moreover, to interpret "solicitation of orders" in terms of a single act—the sales pitch for such orders—would make no sense. It would mean that a company was theoretically immune from taxation for the sales pitch itself but nevertheless taxable because the salesman drove to the location of the customer, assessed the customer's potential, displayed samples, made notes of the customer's needs, handed out a business card with the telephone number of the home office, prepared a sales report, or performed other acts inextricably bound up in making

[20] *International Shoe*, 107 So.2d at 640; *International Shoe* Pet. for Cert., Oct. Term 1958, No. 807, at 7-8; *International Shoe* Oppos. to Cert. at 2.

One activity that Senator Byrd specifically said would be immunized by Section 381 was renting a hotel room to display samples to potential customers. 105 Cong. Rec. 16353-54 (1959).

the sales pitch. Without immunity for these ancillary aspects of the business of solicitation, no company would be able to qualify for Section 381's immunity, and the statute would be a nullity.

II. THE WISCONSIN SUPREME COURT CORRECTLY CONSTRUED SECTION 381 AND ADOPTED A STANDARD THAT CARRIES OUT CONGRESS' INTENT

A. Petitioner Mischaracterizes the Holding Below

The Wisconsin Supreme Court formulated a sensible, restrained standard for applying Section 381 in cases where the issue is whether an out-of-state company's "business activities" within the State exceed the scope of "solicitation" protected by the statute:

> When analyzing a claimed immunity under 15 U.S.C. sec. 381, a court should look at whether the activities are closely associated and inextricably bound up with "solicitation of orders." [A 41.]

The court recommended that several factors be considered in making this determination. Courts should consider "[n]ot only what is done, but what is *not done* in a state," and should keep in mind "the type of business involved, and the manner in which products are sold and orders are solicited." A 42 (emphasis in original). Courts also should analyze any activities which are alleged to exceed the scope of protected solicitation in relation to all of the company's activities to determine if they are *de minimis* deviations from normal practice. *Id.*[21]

[21] Petitioner claims that the court below erred by not focusing on Wrigley's share of the market. Ptr. Br. 20-21. But that is an argument, like so much else in the briefs of petitioner and the *amici* supporting it, that should be addressed to Congress. In fact, one of the arguments made in *International Shoe*—which Congress intended to overrule—was that the company was making multi-million dollar sales in the taxing State. *See* p. 16, *supra*. There is no distinction based on size or market share in the statute. On the

In so ruling, the Wisconsin Supreme Court aligned itself with the courts of Pennsylvania and New York, which had construed Section 381 similarly. A 35-44, citing *United States Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 386 A.2d 471, 478, *cert. denied*, 439 U.S. 880 (1978) (" 'solicitation' does not stop at the moment a prospective customer (or wholesaler) is asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate consumer, also fall under the rubric 'solicitation' "), and *Gillette Co.* v. *Tax Commission*, 56 App. Div. 2d 475, 393 N.Y.S.2d 186 (3d Dept. 1977), *aff'd*, 410 N.Y.S.2d 65 (1978). The court's reliance upon *United States Tobacco* was particularly appropriate, inasmuch as no other published decision involved such closely analogous products and solicitation activities (which also were concerned with the freshness of the company's products and the prominence of the product displays).

The Wisconsin court's decision was firmly grounded on the legislative history of Section 381, as extensively analyzed by the *United States Tobacco* court, 386 A.2d at 477-478.[22] *United States Tobacco* and *Wrigley* are thus

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contrary, one of the objections made by those *opposing* the statute was that a company could ship to all 50 States, "do $100 million worth of business," and still not pay "a thin dime in income tax" except in its home State. 105 Cong. Rec. 16358 (1959); *see also id.* at 16470, 16493, 16496, 16500. Amendments offered to make the statute applicable only to small concerns or inapplicable to those with more than a minimum amount of sales in a State were defeated. *See* 105 Cong. Rec. 16491, 16499, 16501 (1959).

[22] The *amici* brief of three States criticizes the Wisconsin Supreme Court for relying upon a Senate report accompanying the predecessor to Section 381. N.J. Br. 8. Their argument rests on the fact that the Bill as reported was amended to delete a provision allowing for the maintenance of an in-state office. But the portions of the report quoted by the Wisconsin Supreme Court do not concern the office provision and remain valid despite the deletion of that provision. *See* A 28-29.

the only published decisions which pay any disciplined attention to Congress' intent in enacting the statute. This Court declined to review the Pennsylvania Supreme Court's decision in *United States Tobacco.*

Petitioner mischaracterizes the Wisconsin Supreme Court's decision when it states that the court's essential holding is "that any activity whose purpose is 'encouraging future orders' constitutes 'solicitation.' " Ptr. Br. 25. The court simply held that "[t]he mere fact that these orders [*i.e.*, orders which result from activities for which immunity is sought under the statute] may be future orders does not necessarily result in loss of immunity." A 41. Petitioner's conclusion that this construction of the statute would result in all of Wrigley's activities, including even manufacturing, being deemed solicitation of orders is wholly wrong. Petitioner also criticizes the Wisconsin Supreme Court for construing the statute so "that immunity is the rule and taxation the exception." Ptr. Br. 25. Petitioner, however, is unable to cite any part of the text of the decision to support such a criticism.

Rather than attempt to accomplish Section 381's purposes through an exercise in line-drawing or list-making, the court, like Congress, articulated a standard which focuses upon the essential character of the activity in question and whether an activity of such character falls within the scope of "solicitation of orders." *See*, A 43-44 ("The rental storage space is certainly not the type of warehouse Congress envisioned when it referred to a company losing immunity under 25 [sic] U.S.C. sec. 381 for maintaining a warehouse").

Thus, the standard articulated by the Wisconsin Supreme Court embodies the legislative intent of Section 381: to immunize from state income taxation not only the "pure" solicitation of orders but also the "business activities" routinely associated with deploying a sales force to conduct the solicitation, so long as there is no

office, plant, warehouse or inventory in the State. As one commentator has put it:

> The essential purpose and design of Public Law 86-272 were to grant tax immunity to out-of-state vendors who are not "local merchants," but have salesmen in the State who solicit orders for acceptance out-of-state and for shipment of the goods to customers from other States. Activities such as checking inventory, assistance in display of a promotion, dealing with shipment delays, damaged merchandise, and the like typify the customary functions of sales representatives of out-of-state merchants. [J. Hellerstein, *State Taxation*, 245 (1983).]

B. The Standard Applied Below Is Superior to Those Urged by Petitioner and the Amici Supporting It

Petitioner suggests that the primary purpose of Section 381 was to create clarity and certainty in the wake of *Northwestern States*. To this end, it urges the Court to adopt a "bright line" test in the form of a line of demarcation drawn through the point of sale. Such a line purports to distinguish "solicitation" from "non-solicitation" activities by characterizing all sales activities as either leading to or following the placing of orders. Ptr. Br. 25. This effort, however, would enmesh the courts in a quagmire of decision-making over when a sale actually occurred (whether, for example, at the time of order, delivery, acceptance, or payment) and whether a whole series of activities (such ~~as a~~ call to determine whether delivery was made or discussions over replacement orders) came inside or outside the "bright line" of sale.

The pre-sale post-sale test ~~also~~ ignores the commercial reality that, for most products, solicitation activity which follows chronologically in the wake of one sale is nevertheless causally related to another sale yet to come. Which specific sale, then, is a court to use as its measure? Because the timing of such activity makes little difference to the essential character of the activity, it will be impossible

in most cases for the courts and taxing authorities to draw the line the test requires, and to decide whether a particular act of solicitation leads up to one sale or follows from the previous sale. The likely result is that cases will be decided arbitrarily and inconsistently, the very same activity being characterized differently by different courts in different cases. In the end, tax practitioners and business planners will be no less confused and uncertain than they claim to be now.

The standard articulated by the Wisconsin Supreme Court is superior to the pre-sale/post-sale test because it concentrates on the promotional character and purpose of the activities, as well as the business realities of the market in which they take place, rather than merely upon the point in time at which they occurred.

By way of example, soliciting orders for chewing gum is not like soliciting an order for a 60-ton generator. Years of effort might be devoted to the sale of that generator and, once the purchase is made, the seller might be heard from no more. In fact, such a sale might well be a once-in-a-lifetime experience for both buyer and seller. To the manufacturer of chewing gum, on the other hand, the sale of a single pack is of relatively little consequence; it is the ongoing process by which packs are sold and replaced, and new packs are noticed, sold, enjoyed, and replaced, that is the key to successful solicitation. The placing of a display, the on-the-job training of a salesman, and the replacement of stale gum are all integral parts of "solicitation"—of the appeal to customers and consumers to buy and rebuy, of the "pursuit" and "practice" of seeking to obtain a steady stream of orders. If, for example, a consumer chews a stick of stale gum, the significance is not in the event itself but in the after-fact: that he may never purchase another pack. Thus, the practice of discovering and replacing stale gum is, like so much else that a chewing gum salesman does, inextricably bound up in soliciting sales.

In the real world, the effort to encourage the customer to place more orders is what characterizes "solicitation", and that effort is a constant undertaking, an ongoing activity that does not necessarily begin or end with a given sales pitch or a particular order. With a product sold in a constant volume, customers are repeatedly replenishing their stock—such as is the case with Wrigley's product and customers. In sum, drawing a line against certain solicitation activities simply because they do not take place until after a particular sale cannot be justified, even though these activities share the same qualities, purposes and characteristics as the activities that take place before the sale, and are, themselves, geared to future sales.

Furthermore, petitioner fails altogether to show that Congress intended such a line to be drawn. Nowhere in the legislative history is there any mention of such a standard. In fact, there is no evidence that Congress attached any significance whatsoever to the point in time when the activity was conducted.

In truth, petitioner's test defeats Congress' intent. If the pre-sale/post-sale test effectuated Congress' purpose, it should reproduce the outcome Congress sought when applied to the facts of the cases that Congress intended Section 381 to overrule. It does not.

For example, if the pre-sale/post-sale test has any validity, it should change the outcome in *Brown-Forman*. Brown-Forman was held subject to state taxation because its missionary men assisted wholesalers to obtain suitable displays of merchandise in retail establishments. This type of activity could take place either before or after any sale—although the display of a product, as a rule, takes place after the sale of the product. It comes as no surprise that the Supreme Court of Louisiana did not specify whether those visits were made before or after a given sale; the timing of the visits was immaterial to the promotional character of those activities.

Similarly, in *International Shoe*, salesmen rented hotel rooms or rooms in public buildings to display their wares. Under petitioner's test, this activity would be immune if a sale was made; but the immunity presumably would evaporate if the salesman failed to consummate a sale or if he stayed in the room and attempted to make further sales but was unsuccessful. The immunity also apparently would not cover his activity in paying for the rented space and returning left-over goods to wherever they were kept. Such an "immunity" would in fact be illusory, and *International Shoe* would remain in full force and effect.

Thus, under the suggested pre-sale/post-sale test, the results in *Brown-Forman* and *International Shoe* would not change. If the test cannot accomplish Congress' purpose in the archetypical cases, it certainly will not effectuate the legislative will in the broad range of cases to which Congress intended it to be applied. This Court should not do what Congress failed to do—rewrite the statute so as to grant immunity only in terms of "sales," or of activity that precedes sales. "Business activities" relating to "solicitation" are necessarily broader.

MTC proposes that the Court define solicitation as "activities that directly seek the placement of an order and such collateral activities that are a necessary part of that effort." As a corollary, any activity which "serves the out-of-state seller beyond the direct attempt to secure the placement of an order" is a "dual-purpose" activity and is not immune from taxation. MTC Br. 24.[23]

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[23] Many of the activities conceded by the 29 *amici* States to be immunized under Section 381 apparently would not pass MTC's test. Examples of permissible activity given by these States include "demonstrating how the product works, answering questions regarding pricing or warranties, leaving product brochures or samples to be tried by the prospective customer, or even telling the prospective customer how the product might be resold if the customer purchased it." 29 States Br. 13.

This standard, although it appears more neatly tailored than the pre-sale/post-sale test, is no better suited to carrying out Congress' purposes, and will produce no fairer or more certain results, than will the standard articulated by the Wisconsin Supreme Court. With regard to its ability to achieve the results Congress intended, the MTC standard can be tested in the same way that the pre-sale/post-sale standard was tested: apply it to the facts of *Brown-Forman* and *International Shoe* to see whether the outcome changes.

In *Brown-Forman*, the missionary men do not appear to have been seeking "directly" the placement of any orders; the immediate focus of their activity was on the arrangement of merchandise, not on the sale of additional merchandise, and not on additions to the inventory of the retailer or wholesaler. In *International Shoe*, the renting of display space, like advertising, could as easily be geared to good will as to direct sales. The relationship between display activities and the placement of orders would appear to be indirect at best in both instances, and therefore the activities would not be immune. Congress' intent would be thwarted.

Nor is the MTC standard any more useful in practice than the pre-sale/post-sale test. Appended to the MTC brief are the guidelines developed by MTC and used in practice by the taxing authorities in a number of States. One would presume that MTC's proposed standard is consistent with these guidelines and would reliably predict what kinds of activities are immune and nonimmune under them. (MTC suggests that the test it proposes is reflected in its guidelines. MTC Br. 25.)

Such is not the case, however. For example, among the activities the MTC considers immune under its guidelines is "[p]assing inquiries and complaints on to the home office." MTC Br. App. 7, ¶ 4. Certainly this is not an activity which seeks the direct placement of an order, nor can it be said, under the strict interpretation MTC

gives its own standard, that passing on complaints is a collateral activity that is "necessary" to seeking the direct placement of orders. Thus, a clearly-established immune activity under the guidelines would be nonimmune under MTC's proposed standard, demonstrating that the standard will hardly promote clarity or certainty.

Furthermore, while the MTC guidelines are not a definitive treatment of what Congress meant by "solicitation of orders," they at least give some real-world evidence of what is ordinarily thought to be included within solicitation. The guidelines were drafted by taxing authorities with a certain agenda and bias, but their content is influenced by the kinds of activities with which revenue agents have become familiar over the years. The fact that there is agreement among the States that "[p]assing inquiries and complaints on to the home office," *id.* (or, for that matter, "[c]hecking of customers' inventories", *id.* at ¶ 7) falls within the scope of protected solicitation shows that the standard articulated by the Wisconsin Supreme Court ("activities [that] are closely associated and inextricably bound up with 'solicitation of orders' ", A 41) is in the mainstream of what even those seeking to enhance state revenues consider solicitation to be.

Finally, as we show below, Wrigley's activities, as revealed by the record and properly interpreted by the Wisconsin Supreme Court, are encompassed by the immune list urged upon the Court by MTC; Wrigley did not engage in any of the nonimmune activities, with one possible exception.[24] Therefore, even if the Court were to

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[24] Guideline number 12 under nonimmune activities lists "[h]iring, training or supervising personnel." MTC Br. App. 6, ¶ 12. Wrigley's final hiring decisions were made in Chicago, not in Wisconsin, and, as noted elsewhere, Wrigley did not conduct formal training sessions in the State. As for "supervising," however, if this indeed were a non-immune activity, virtually no company in the country could qualify under the statute, since salesmen, like all employees, must always be supervised, in one fashion or another, wherever they operate.

adopt these guidelines, the judgment below should be affirmed.

III. THE COURT SHOULD IGNORE LABELS AND CONCENTRATE INSTEAD ON WHAT CONGRESS ATTEMPTED TO ACCOMPLISH

Characterizing the decision of the Wisconsin Supreme Court as being in the "minority," petitioner suggests that the Court should interpret Section 381 in a way that a purported "majority" of courts have—narrowly, petitioner implies. Ptr. Br. 20; *see also* MTC Br. 17. We dispute that the decision below is part of a minority, but in any event, counting heads will be of little assistance to the Court in determining what Congress intended in this statute. Although issues surrounding the application of Section 381 have confronted courts of last resort around the country, all but a few have addressed the issues without bothering to explore Congress' intent. In fact, many of their decisions were rendered without any statutory analysis at all.

For example, the *amici* States of New Jersey, Alaska and Arkansas urge the Court to adopt the *per curiam* holding of the New Jersey Supreme Court in *Clairol, Inc.* v. *Kingsley, supra*. *Clairol*, like so many other cases in this area, was decided strictly on its facts, without any effort whatever to formulate a rule to govern other cases on other facts. The *Clairol* court did not even articulate the rule or standard which guided it to its own decision. The case is of no value here,[25] as attested to by the fact

[25] The three States also note that this Court dismissed *Clairol* for want of a substantial federal question on appeal from the New Jersey Supreme Court. They suggest that, through this summary disposition, the Court essentially ratified the New Jersey court's interpretation of Section 381. The dismissal in *Clairol*, however, clearly is not controlling in the present case. This Court does not accord full precedential value to summary dispositions, because they are rendered without a full opportunity to consider the issues after

that *amici* MTC and the City of New York do not cite it at all, and the 29 State *amici* mention it only in passing, without discussion. 29 States Br. 8.

Likewise, little can be gleaned from cases that attempt to categorize the holdings of other cases according to labels such as "strict," "broad" or "narrow." *See, e.g., Chattanooga Glass Co.* v. *Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979) (*quoted in* Ptr. Br. 19-20). These labels have little inherent meaning; they are relative terms, gauged without reference to any fixed standard.

Take the decision on review in this case: petitioner labels it "expansive." Ptr. Br. 20. However, the standard articulated by the Wisconsin Supreme Court would not have reversed the outcome in *Clairol*, perceived to represent a "strict" construction of the statute. In that case, the taxpayer provided in-state technical service to its customers, an act which is not closely associated with or inextricably bound up in solicitation (servicing a product and selling a product being two separate and self-sustaining business activities). The outcome in *Clairol* would have been the same regardless of whether it was decided under the purportedly "strict" view of the New Jersey Supreme Court or under the supposedly "expansive" view of the Wisconsin Supreme Court. As this comparison reveals, the fact-intensive nature of the published decisions in this area makes comparing cases on the basis of these labels unproductive.

In this regard, petitioner seeks to have the Court impose the narrowest possible definition of "solicitation." But the

briefing and argument. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *see also Connecticut* v. *Doehr*, 111 S. Ct. 2105, 2113 n.4 (1991); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); W. Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 790 (1974) ("No one seriously contends that these summary affirmances receive the full consideration that is given to a case argued on the merits and disposed of by written opinion").

fact is that Congress repeatedly expressed its concern about two taxpayer burdens that such an interpretation would not ameliorate: double taxation of companies by States using different formulas for apportionment, and the burdensome cost of recordkeeping and compliance.[26] Congress did not want companies to have to maintain records, retain counsel, and hire accountants in order to keep up with the tax practices in a multitude of jurisdictions. *See* 105 Cong. Rec. 16930 (1959). If a narrow view of solicitation is adopted, most companies will have to revert to carrying the very burdens that Congress sought to avoid, because virtually no company is as restricted in its activities as petitioner describes. Thus, what petitioner really seeks is to achieve through this Court what it has been unable to obtain from Congress—an eviscera-tion of the statute.

IV. THE STATUTE NECESSARILY RECOGNIZES AN EXCEPTION FOR DE MINIMIS ACTIVITIES

Petitioner and the *amici* argue that the presence of the term "only" in the statute precludes any exception for nonimmune activities, even if they are so infrequent and inconsequential as to be *de minimis*. However, there is no evidence that Congress intended to be so unforgiving of trifling departures from normal practice.

On the contrary, the *de minimis* principle is one so well rooted in the law that Congress must be presumed to have recognized it. In fact, the principle has been recognized by this Court in a long line of cases,[27] was noted during

[26] *See, e.g.*, S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2550-51; S. Rep. No. 453 at 3-6; 105 Cong. Rec. 11958, 16362, 16479, 16484, 16495, 16500, 16929-30, 17772-75, 17837 (1959).

[27] *E.g., Texas State Teachers Ass'n* v. *Garland Ind. School District*, 489 U.S. 782, 792 (1989); *CFTC* v. *Schor*, 478 U.S. 833, 856 (1986); *Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986); *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 773 (1984); *United States* v. *Jacobsen*, 466 U.S. 109, 125 (1984); *Lynch* v. *Donnelly*, 465 U.S. 668, 684 (1984); *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 450-451 n.34 (1984); *Brown* v. *Thomson*, 462 U.S. 835, 847 (1983); *Clements* v. *Fashing*, 457 U.S. 957, 967 (1982); *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 494 n.7 (1980); *Washington* v. *Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 n.29 (1979); *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.21 (1979); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 111 (1977); *Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977); *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 18 (1976).

the debate on this very statute,[28] and was implicitly provided for by petitioner in its own regulations.[29]

Without such an exception, the State could defeat the whole purpose of Section 381 by discovering at least once a year some minor, unintended or overlooked deviation from a company's normal way of doing business. No matter how scrupulous a company is, the exigencies of the

[28] In the discussion of a proposal that would have allowed the use of an office in the taxing State so long as its "sole" use was to serve those soliciting orders, Senator Bennett pointed out: "It [such a bill] would not prevent what might be called minimal or incidental and accidental use of the office." 105 Cong. Rec. 16469 (1959).

In addition, petitioner's tax counsel wrote to the Senate Finance Committee during hearings on this legislation:

> [The] fact is that a number of States have been imposing taxes on income earned in interstate commerce for some years now and they have followed a policy of restraint as to occasional, irregular, or inconsequential activities * * *. [*State Taxation of Interstate Commerce: Hearings on S.J. Res. 113, S. 2213 and S. 2281 before the Senate Committee on Finance*, 86th Cong., 1st Sess. 225 (1959) (statement of Arthur B. Barber).]

[29] Section Tax 2.82(3), Wis. Admin. Code, drafted after this case arose, describes petitioner's view of the line between protected and unprotected solicitation under Section 381 and provides that foreign companies may engage in "usual or frequent" activity in the State without triggering tax liability. Implicit in such a regulation is the acknowledgement that unusual or infrequent (i.e., *de minimis*) activity falling outside the scope of solicitation is insufficient to support tax jurisdiction.

business world are bound to cause it to veer off course on occasion. How could a company ever predict its tax base if it legitimately carried out its business under the statute during the bulk of the year but suddenly became liable for an entire year's taxes because of a glitch or passing incident? That is why this Court has been chary to impose "'grave legal consequences upon * * * distinctions that are of *de minimis* meaning and effect.'" *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 773 (1984) (*quoting Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962)).

V. WRIGLEY'S BUSINESS ACTIVITIES IN WISCONSIN WERE PROTECTED FROM TAXATION BY SECTION 381

As the Wisconsin Supreme Court found, "[e]ach of Wrigley's activities in Wisconsin during 1973-1978 were incidental to the solicitation of orders of gum [and in any case were] * * * so minor as to be *de minimis*." A 41. Through overstatement and unfair characterization, petitioner and the *amici* attempt to show that Wrigley's activities were beyond the scope of solicitation. Viewed correctly, the facts of this case demonstrate that Wrigley is entitled to the immunity of Section 381.

For example, petitioner and at least one *amicus* cite to the rare involvement of Wrigley's regional sales manager for the years 1973-1975 in credit matters. *See* Ptr. Br. 27; MTC Br. 24-25. The evidence shows that in a few instances he intervened on behalf of the *customer* and only for the purpose of cultivating the client and encouraging future sales, not to obtain payment or collection. JA 71-73. These activities were necessary to make sales and were inextricably bound up in the attempt to solicit business from those customers. Certainly these activities furthered no interest of Wrigley in collecting past due accounts.

As another example, petitioner and MTC accuse Wrigley of maintaining an in-state warehouse. Ptr. Br. 27; MTC Br. 23. In fact, the record demonstrates that an insignificant amount of space was rented at nominal cost by a single employee in his own name in order to store his samples while he was not on the road. The employee rented this space because he lived in an apartment too small to accommodate these samples. JA 61-62, 100-101. The Wisconsin Supreme Court was not troubled by this activity, which was necessary to that salesperson's ability to solicit orders in Wisconsin, because this rental was an isolated exception to Wrigley's normal practice and was "not the type of warehouse Congress envisioned when it referred to a company losing immunity * * * for maintaining a warehouse." A 43-44.

Petitioner attempts to create the impression that Wrigley maintained a stock of inventory in the State and made direct sales from it. Ptr. Br. 32. The inventory to which petitioner refers is the representatives' supply of sample/replacement product typically kept at the representatives' homes. As noted above, the nature of the product Wrigley was trying to promote dictated that stale product be replaced with fresh. This was not a means of filling orders; it was a promotional necessity. Thus, as the *United States Tobacco* court found in almost identical circumstances, stale product replacement is "precisely the kind of sales activity" envisioned by "solicitation." 386 A.2d at 478; *see also Gillette*, 393 N.Y.S.2d at 188 (permitting foreign companies to "insure [that their products were] attractively arranged and in saleable condition"). Furthermore, given how miniscule the amount of inventory was, and the fact that at any given time 40% of it was stale, this activity was *de minimis*.

Petitioner also takes issue with the fact that Wrigley supported and supervised its distant sales force with an in-state salesperson who doubled as a manager. Although most of the time spent by this employee was in pursuit of chewing gum orders, he played a role (but not the

decision-making role) in personnel matters involving local sales employees. JA 90-91, 98, 103-104, 112-115. These activities were "necessary" activities—activities which, like providing a company car, are incidental to the sales pitch and necessary to delivering it. Because a foreign company may be located at a distance from the solicitation State, it would be unfair and unrealistic to expect all such activities (conducting interviews, finding candidates, giving on-the-job training, evaluating employees' performance, and providing local input into home office decisions, such as termination) to be conducted exclusively outside the State's borders. The ministerial nature of these activities is evidenced by the fact that recommendations by the regional sales manager were often ignored by the home office; they certainly do not change the overall promotional character of the company's presence in the State. *See United States Tobacco*, 386 A.2d at 479 (providing company cars does "not change the character of [the company's] promotional activities" and should be viewed as within the scope of Section 381).

Likewise, petitioner treats the assigning of experienced representatives to work with new hires in the field as tantamount to the conduct of "training center[s]." Ptr. Br. 32; *see also id.* at 10. When viewed realistically, however, these activities are "necessary" to support, and incidental to, an ongoing solicitation effort in the State. The same is true with regard to the fact that the regional manager for the years 1973 to 1975 kept a desk and a company-owned file cabinet where he prepared his reports at home in the corner of his basement. Not only is such an activity a common-sense companion to the activity of soliciting sales at some distance from headquarters, but it is simply too thin a reed to support the exercise of state tax jurisdiction over interstate commerce.[30]

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[30] Petitioner makes passing reference to Wrigley's use of a Wisconsin landfill to dispose of stale gum. Ptr. Br. 9, 33. The evidence was that stale gum was normally packaged and returned to Chicago, but that in one part of one of the six years in question it was sometimes taken to a local dump (which might have been private) for disposal. JA 39, 45, 61, 118. This fact was so insignificant that it was not even referenced by the courts below.

The argument has been made that, when Wrigley's various unprotected activities in Wisconsin are viewed in combination, they are beyond *de minimis*. That approach is unsound for two reasons. First, Section 381 requires that the activities of the taxpayer be analyzed in each separate "taxable year." 15 U.S.C. § 381 (a)(1). Not all of the activities analyzed above took place in each of the six years at issue, so combining the activities that took place in separate years would violate the statute. *See* A 211. Second, these activities are *de minimis* even if considered together; they do not change the essential and overwhelming character of Wrigley's presence in Wisconsin, geared to the solicitation of orders for chewing gum.

VI. PETITIONER'S ARGUMENT RELATING TO NEXUS SHOULD BE ADDRESSED TO CONGRESS

Petitioner argues in the second section of its brief that because "[n]exus jurisprudence has undergone a considerable evolution," Ptr. Br. 29, Section 381 should be construed so as to permit Wisconsin to impose an income tax upon Wrigley. This contention is wide of the mark.[31] To the extent that "nexus jurisprudence" has evolved, this "evolution" has affected the authority of the States only in those commercial contexts in which Congress has remained silent. Where, as here, Congress has enacted a statute explicitly regulating the taxing authority of the States, the "evolution" of nexus jurisprudence is simply irrelevant.

Petitioner attempts to bolster its argument by pointing out that Congress, in passing Section 381, "recognized that

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[31] It is also an afterthought, having not been made below.

the concept of nexus would continue to be defined by the courts." Ptr. Br. 28. This assertion, although true, proves nothing. As the Senate Report quoted by petitioner explains, Section 381 permits the judiciary to determine "whether business activities *other than those described in the bill*" justify the imposition of a state income tax. S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2554 (emphasis added). With respect to the "solicitation of orders," the matter already has been resolved definitively by Congress; States may not impose an income tax premised on such activity.

Petitioner also notes that "nexus" doctrines have evolved so as to establish a "'"consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax."'" Ptr. Br. 30 (*quoting Trinova Corp.* v. *Michigan Dept. of Treasury*, 111 S. Ct. 818, 828 (1991) (*quoting Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980))). Again, although this assertion may be true, it relates only to this Court's constitutional jurisprudence and thus is not relevant. Petitioner suggests that the same "economic realities" informing this Court's decisions under the Due Process and Commerce Clauses should control its interpretation of Section 381. *See* Ptr. Br. 30. But this fallacious implication, like the other "nexus" arguments advanced by petitioner, reflects a fundamental misunderstanding of the different roles that Congress and the courts play in regulating interstate commerce.

The Commerce Clause explicitly grants to Congress, rather than to the courts, the authority to regulate "commerce among the several states." U.S. Const. art. I, § 8, cl. 3. It is true that this Court has long held, *see Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), that the Commerce Clause by negative implication allows the federal judiciary to free "interstate commerce from [certain] restrictions * * * impos[ed] by the States." *Northwestern States*, 358 U.S. at 458. But this implied power of the

courts exists only so long as Congress remains silent; when Congress chooses to act, its "power * * * over commerce * * * is not restricted, except as the Constitution *expressly* provides." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946) (emphasis added).

The *Prudential* decision makes clear that it is Congress, rather than the courts, that has "plenary and supreme authority" over interstate commerce. *Id.* at 423. There, the Court considered the validity of a tax that South Carolina imposed on out-of-state insurance companies conducting business within its borders. Because local insurance companies were not subject to a comparable levy, the tax clearly discriminated against interstate commerce. The Court nevertheless upheld the tax because Congress, acting pursuant to its express authority under the Commerce Clause, recently had passed the McCarran Act.

The McCarran Act, which is still effective, provides in pertinent part that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the insurance] business by the several States." 15 U.S.C. § 1011. The *Prudential* Court reasoned that because this federal statute authorized the imposition of discriminatory state taxes, there was no reason for the Court even to consider whether the challenged South Carolina tax ran afoul of the Commerce Clause. The Court reasoned that such analysis was unnecessary because Congress had "expressly stated its intent and policy." *Id.* at 427.

In this case, as in *Prudential*, there is no reason for the Court to consider whether the challenged state action "would be valid in the dormancy of Congress' power," *id.*, for the simple and undisputable reason that Congress *has* acted. The judicial authority cited by petitioner in the second section of its brief, like the arguments advanced therein, is thus rendered totally inapposite; with

one exception,[32] each of the decisions cited is concerned with constitutional limits on state power when Congress is silent.[33] The petitioner in *Prudential* made the same mistake, and it was discussed at length by the Court:

> No one of them [the cited cases] involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. * * * [C]onsequently, * * * they [cannot] stand as controlling precedents * * *. [328 U.S. at 421.]

Petitioner's misguided "nexus" arguments are inconsistent not only with this Court's decisions, but also with Congress' pronouncements; Congress has long recognized its own primacy in the area of interstate commerce. Indeed, the Senate Report relied upon so heavily by petitioner, *see* Ptr. Br. 21, 23, 28-29, provides that questions left unresolved by Section 381 are "for future determination *by the Congress*, or *in the absence of congressional action*, by the courts." S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2554 (emphasis added).

All that remains are petitioner's arguments that immunizing the "solicitation of orders" from state income tax is " 'antediluvian,' " Ptr. Br. 33 (*quoting* Pomp, *State Tax Reform for the Eighties: The New York Tax Study Comm'n*, 16 Conn. L. Rev. 925, 927-928 n.8 (1984)), and inconsistent with "economic realities." Ptr. Br. 32. These are policy arguments, however, that must be addressed to the Congress, rather than to this Court, which is bound to reject such invitations to amend federal statutes. *See Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 280 (1978); *United Steelworkers of America* v. *R.H. Bouligny, Inc.*, 382 U.S. 145, 150-153 (1965).[34]

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[32] Petitioner and several *amici* rely heavily upon this Court's decision in *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275 (1972). Their reliance is misplaced. *Heublein* held simply that Section 381 does not prohibit a State from regulating the activities of a foreign corporation—such as by requiring the maintenance of a warehouse within the State—even if such regulation incidentally causes the corporation to forfeit its Section 381 immunity.

[33] One of the "nexus" cases upon which petitioner mistakenly relies is *D.H. Holmes Co.* v. *McNamara*, 486 U.S. 24 (1988). There, the Court upheld a Louisiana use tax imposed upon a large Louisiana department store. Not surprisingly, the Court found that the department store's contacts with Louisiana more than satisfied the constitutional prerequisite of "substantial nexus." *Id.* at 32. The fact that the Court, in making this finding, stated that there was "nexus aplenty," *id.* at 33, clearly was not meant to suggest that a new legal standard had been adopted. But to the extent that "nexus aplenty" has judicial relevance, it is only in those cases, such as *D.H. Holmes Co.*, in which Congress has not acted.

[34] The argument advanced by the MTC in its *amicus* brief is another policy argument that should be addressed to Congress. The complexities of devising a rational system of apportioning income among several States may be considered by the Court when, in the absence of Congressional action, the Court develops constitutional rules governing the state taxation of interstate commerce. But when Congress has passed a law such as Section 381, which explicitly regulates the imposition of state income taxes on businesses engaged in interstate commerce, the Court's limited duty is to construe the statute.

CONCLUSION

For all of the foregoing reasons, the decision of the Wisconsin Supreme Court should be affirmed.

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